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IN THE

Supreme Court of the United States

October Term, 1950

No. 136

UNITED STATES OF AMERICA,

Petitioner,

vs.

SAMUEL H. KASINOWITZ, HENRY STEINBERG, and BEN DOBBS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

Respondents were each convicted of criminal contempt and sentenced to serve one year in jail by the District Court for the Southern District of California [R. 31, 32, 34]. The judgment below (Opinion reported at 181 F. 2d 632) reversed these convictions and ordered the proceedings against respondents dismissed [5 R. 12].[1] The judgment of the trial court rested upon respondents'

[1]We shall adopt the same method of referring to the record as was employed by petitioner (see Petition, Note 1, page 1).

refusal to answer, before the grand jury, questions concerning one Dorothy Healy. These questions were in substance: Do you know Dorothy Healy, her business or home address, her occupation, where she can be located, whether she is married, her husband's name and occupation [R. 3, 6, 9].[2] Respondents refused to answer these questions for the reason that their answers might tend to incriminate them. Their claim of the privilege against self-incrimination was grounded upon fear of prosecution under the Smith Act (18 U. S. C. (1948 ed.) 2385, 371) by reason of being connected through membership or affiliation with the Communist Party.

The instant proceedings against respondents began with their interrogation before the grand jury on November 3, 1948 [See R. 217, 225, 234]. But in fact they had been caught up in the grand jury's investigation at an earlier date and asked questions which have an important bearing upon their claim of privilege here. Respondents were originally summoned before the grand jury by subpoenas served upon them before daybreak on the morning of October 25, 1948, calling for their appearance at 10:00 A. M. that day [See 4 R. 140 ff; 5 R. 4]. They were then asked substantially whether they knew the names of the officers of the Communist Party in Los Angeles County and the "table of organization" of the Com-

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[2]The trial court's orders to answer these questions appear at R. 228, 238, 239. Respondent's refusals to answer, which formed the basis of the presentments, will be found at R. 212-213, 229-231, 239-242.

munist Party there. For their refusal, based upon a claim of privilege similar to that in the present case, they were adjudged in civil contempt, after proceedings lasting until midnight on October 25, 1948, and ordered committed until such time as they should make answer [R. 191, 193, 194].[3] They were released pending appeal on November 3, 1948, by order of Chief Judge Denman of the Court of Appeals for the Ninth Circuit[4] and, as they stepped from the jail door, they were served with subpoenas to appear before the grand jury "forthwith" [R. 24]. They were interrogated on November 3, 1948, concerning Dorothy Healy in connection with the same grand jury investigation as that for which they had been routed out of bed and interrogated on October 25, 1948 [R. 265-266].

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[3]It was this proceeding which gave rise to the appeal designated *Alexander et al. v. United States* (9 Cir.), 181 F. 2d 480, to which petitioner refers (Petition, Note 1, page 1). The record in that case was incorporated in the record of this case by order of the trial court [R. 345].

[4]The order does not appear in the record.

Summary of Respondents' Showing.

Since the questions asked respondents did not indicate the possible incriminatory nature of their answers, they adduced or proffered evidence to show the "setting" in which answers might create a rational fear of prosecution. Summarized this showing is as follows:

1. **The Purpose of the Grand Jury Investigation, to the Extent That the Government Disclosed It, or the Trial Court Permitted Government Counsel to Testify Concerning It, Was to Ascertain the Whereabouts of the Membership Records of the Communist Party. The Government Had Reason to Believe Respondents Could Give This Information.**

James M. Carter, Esq., then United States Attorney for the Southern District, was in charge of the grand jury investigation before which respondents were summoned on November 11 and November 12, 1948 [R. 262]. He was called by respondents to testify at the contempt trial. At that time the grand jury was investigating the same general matter as on October 25, 1948, for which these respondents had also been subpoenaed [R. 265-266]. According to Carter this was an investigation into alleged false statements by government employees in their loyalty affidavits [R. 287]. Carter testified that he had made a public statement that the purpose of the investigation was to "ascertain whether or not these people at the time they made the alleged false statements to a government agency were members of the Communist Party, the Communist Party of Los Angeles" [R. 272-273].[5]

---

[5]By some curious twist of logic, the trial court permitted the United States Attorney to testify to what he had said publicly concerning the purposes and objectives of the grand jury investigation, but would not permit him to testify that the facts contained in those statements were true [See R. 270-273, 276, 281, 282].

Carter's purpose, he stated at the trial, was "to ascertain the whereabouts of the records of the Communist Party in so far as they showed membership of the particular individuals who were involved . . ." [R. 287]. Carter testified to a public statement he had made to the effect that when respondents had been originally subpoenaed for this investigation on October 25, 1948, he had selected them and the others because he thought he "could obtain from them the whereabouts of the Los Angeles County Communist Party membership records" [R. 280-281].

Finally, he admitted that he had stated to counsel for respondents that he was "trying to establish before the grand jury" that Dorothy Healy was organizing secretary of the Los Angeles County Communist Party. He testified that he had made this statement when counsel had offered a stipulation as to this connection of Mrs. Healy with the Communist Party [R. 274-275].

2. In Addition, Respondents Proffered a Showing That the Government Questioned Them Because It Had Information That Dorothy Healy, as Organizing Secretary of the Los Angeles County Communist Party, Had Custody and Control of the Membership Records Thereof and That Respondents Could so Testify by Virtue of Their Membership in That Organization.

With respect to the asserted investigation of alleged false statements of government employees, respondents tried to develop by examination of Ahlswede, the grand jury foreman, and Carter, the matters summarized below. Objections by the government were sustained on the ground that the information was immaterial and confiden-

tial [see, *e. g.*, R. 264]. As to each of these items respondents made offers of proof:

(a) That it was the grand jury's purpose to establish that Dorothy Healy was Secretary of the Los Angeles County Communist Party and had custody and control of the membership records of that organization [R. 257-258, 277].

(b) That government counsel furnished information to the grand jury, or its investigation had developed, that Dorothy Healy was Secretary of the Los Angeles County Communist Party and had custody and control of the membership records thereof [R. 259-260, 278], and this is why the questions were asked of respondents [R. 364-366].

(c) That the grand jury summoned respondents because it had information that they were members of the Communist Party and, on that account, could give information as to the position of Dorothy Healy in the Los Angeles County Communist Party and her custody and control of its membership records [R. 260-261, 279].

3. Respondents Proferred a Showing That Dorothy Healy Was Generally Reputed to Be Secretary of the Los Angeles County Communist Party.

Upon stipulation waiving foundation [R. 284] respondents offered, and the trial court excluded only because it was deemed immaterial [R. 287], an excerpt from the findings of the Joint Fact-Finding Committee on Un-American Activities of the California Legislature concerning Dorothy Healy and her husband. In brief, these are:

(a) That Mrs. Dorothy Healy "is presently[6] Secretary of the Communist Party of Los Angeles" and earlier in her career had been an organizer for the Young Communist League under the name of Dorothy Ray [R. 284];

(b) That Mrs. Dorothy Healy "is presently the wife of Don Healy . . . formerly registered as a member of the Communist Party in the County of Los Angeles" [R. 284].

(c) "The Communist Party keeps its publicly avowed members down to the smallest possible number" [R. 291];

(d) The national leadership of the Communist Party is composed of 12 persons who are named [R. 291]. A comparison of these names with the names of the defendants in the conspiracy indictment brought in the Southern District of New York [Ex. A, Idf.; R. 327] shows that they are the same;

(e) The "California headquarters" is located in San Francisco [R. 292];

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[6]The record does not disclose the date of the report. In the course of briefing this case for the court below counsel for respondents have checked the source and state that the publication is dated 1947 and set forth a report of the Legislative Committee dated February 19, 1946.

(f) The "Los Angeles County section" includes "Nemmy Sparks, chairman"; "Dorothy Healy, organizing secretary"; "Ben Dobbs, labor secretary"; "Phil Bock, youth director"; "Merel Brodsky,[7] veterans' director" [R. 292].

4. Respondents Offered to Show That They Had Good Reason to Fear That This Grand Jury Inquiry Was the Beginning of a Criminal Prosecution Initiated by the Department of Justice Against the Communist Party, Its Leaders and Members Under the Smith Act.

Respondents offered in evidence a number of statements attributed by the press in Los Angeles, California, to Mr. Carter and his associate, Mr. Max Goldschein, a special assistant to the Attorney-General, sent out to Los Angeles from Washington for this inquiry. The proffered press statements of Messrs. Carter and Goldschein are as follows:

(a) On October 27, 1948, two days following the day and night proceedings of October 25, 1948 (in which respondents Dobbs, Kasinowitz and Steinberg were involved), the Los Angeles Examiner carried a front page story under the head "Officials Plan 'All-Out' Red Inquiry Here" which read in part as follows:

> "Ten witnesses are jailed for refusing to answer in probe.

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[7]The last two named individuals were appellants in the *Doran* case, which was consolidated on appeal to the court below with the case at bar. Bock was one of those subpoenaed on October 25, 1948. A subpoena had been issued for Brodsky on that date but was not served, he later having been apprehended upon bench warrant. Bock and Brodsky, along with respondents, were therefore part of the group whom the prosecutor admitted he thought knew the whereabouts of the membership records of the Los Angeles Communist Party.

"Communist groups and activities in Southern California are scheduled to undergo a 'top-to-bottom' investigation by a special Federal grand jury here . . .

"This was indicated by high government officials yesterday after ten witnesses were committed to jail for refusing to answer grand jury questions.

" 'This is only the opening gun in the government's inquiry into subversive and disloyal groups,' United States Attorney James M. Carter declared." [R. 302.]

(b) On the same day the Los Angeles Times also gave first page prominence to an interview with Carter and Goldschein. This article read in part:

"Scope of the current inquiry into Communist activities is limited to those of government employees at the present time, U. S. Attorney James M. Carter and Max Goldschein, a Special Assistant to the U. S. Attorney General said.

"Both Carter and Goldschein said that in the event the inquiry turns up evidence of Communistic activities other than among Federal employees they will investigate any such cases and prosecute if sufficient evidence is uncovered." [R. 304.]

(c) The statements attributed to Carter and Goldschein by the Los Angeles press were neither denied nor explained by them in this record.

5. Respondents Proffered a Showing That the National Leaders of the Communist Party Were Then Under Indictment for Having Been Members of the Communist Party, the Same Being Charged to Be a Crime Under the Smith Act, and Further That It Had Been Reported That Nation-wide Prosecutions of the Communist Party, Begun Through Grand Jury Investigations, Were Imminent in Los Angeles and Elsewhere.

All of the evidence here reviewed was offered and rejected as immaterial. In summary, it is:

(a) The indictment returned in the Southern District of New York against 12 persons, being the same as those identified as the "National Secretariat" of the Communist Party, with which Dorothy Healy was connected by the California Legislative Committee [see this summary, *ante,* section 3, and R. 291]. This indictment charges in part that the leaders of the Communist Party,

> ". . . did conspire . . . to organize as the Communist Party of the United States of America, a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence . . ." [Ex. A. Idf.; R. 327-328; offered, R. 295; rejected as immaterial, R. 296].

(b) The indictments brought in the Southern District of New York against the same 12 persons, individually charging each of them with membership in the Communist Party, knowing its purposes to be as alleged in the conspiracy indictment [Ex. B. Idf., R. 331; offered and rejected as immaterial, R. 296].

(c) Extract from the docket of the United States District Court for the Southern District of New York, showing that in the cases referred to above the motion to dismiss was overruled [R. 297, 332].[8]

(d) An offer to prove, through the Attorney General, that he has determined for administrative purposes that the Communist Party advocates the overthrow of the United States government by force and violence and that it is his intent and the plan of his department to obtain indictments similar to the New York indictments "against other persons in other cities of the United States, including specifically the City of Los Angeles, said indictments to be based solely upon the membership or alleged membership of said persons in the Communist Party" [R. 311]. A subpoena was issued for the Attorney General, to testify at respondents' trial. On motion of the government, it was quashed [R. 166-180].

(e) An article in the Los Angeles Examiner for July 21, 1948, on the arrest of the leaders of the Communist Party in connection with the New York indictments just referred to. The article refers to the New York proceedings as "the greatest crackdown on Communists in the nation's history."

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[8]Since then, of course, the defendants in those cases have been convicted and sentenced to long prison terms (New York Times, October 15, 1949, p. 1).

Near the end of the article appears this significant passage:

> "Local Federal attorneys indicated that the indictment and arrest of Foster may be the forerunner of a possible nationwide roundup of all American Communist Party members or persons known to be associated in Communist activities." [Ex. D, Idf., R. 335-336; offered and rejected as immaterial, R. 297-298.]

(f) An article in the Los Angeles Examiner for September 17, 1948, entitled, "Washington Scene" and apparently a syndicated columnist's story on the plans of the Department of Justice. The portions pertinent here follow:

> "The Democrats, through Attorney General Tom Clark, plan a sensational attempt to take the anti-Communist play away from the Republicans in the next few weeks.
>
> "The Department of Justice will seek indictments against well known Communists in key cities all over the country. . . .
>
> "The Department of Justice will make a big production of it. The Attorney General will let it be known his investigators have been on their toes all along, but were only waiting for the time to be ripe before making their spring.
>
> "The move, it is hoped, will have great political effect. It is designed to overplay and overshadow any cracks Dewey might make on Administration laxity in prosecuting enemies of the country. . . ." [Ex. E, Idf., R. 337; offered and rejected as immaterial, R. 299-300.]

(g) An article from the New York Times, of September 29, 1948, setting forth the text of a speech by President Truman, portions of which are:

> "My Administration has been steadily and successfully fighting Communism. We have acted instead of just talking about it. . . .
>
> "The FBI, the greatest counter-espionage organization in the world, headed by J. Edgar Hoover, is alert, vigorous and skillful. It is watching the Communists closely and systematically protecting our internal security.
>
> . . . . . .
>
> "On the basis of evidence collected by the FBI and submitted to the grand jury, twelve top Communist leaders will go to trial in New York on October 15th. We have prosecuted and we shall prosecute subversive activities wherever we find them." [R. 308.]

(h) An article from the New York Times, dated September 18, 1948, setting forth a letter to Attorney General Clark from Senator Ferguson, Chairman of the United States investigating committee, "making urgent request that the Department of Justice take real action seeking indictments against known Communists. . . ." The Senator added that evidence in the possession of his committee and the Department of Justice "constitute in my opinion—and I am speaking as a lawyer of some experience—a more than adequate basis for such indictments."

The same article included this paragraph:

> "As this demand came by letter, it was reported from an apparently responsible source that the Justice Department already had decided to assemble grand juries in Washington, Denver, Salt Lake City, Dallas, Los Angeles and San Francisco for intensive inquiry into Communist activities. These were the cities which Senator Ferguson suggested as possible spawning grounds for indictment against Communistic activities which may have threatened national security." [Ex. I, Idf., R. 305-306.]

(i) In this connection there is to be considered the public statements attributed to Messrs. Carter and Goldschein on October 27, 1948, after the opening of the grand jury inquiry before which respondents had been summoned. These statements were to the effect that the grand jury was engaged in a "top-to-bottom investigation" of "Communist activities" which was only an "opening gun in the Government's inquiry into subversive and disloyal groups," and that evidence of Communistic activities, if sufficient, would lead to prosecution [see section 4 of this summary, *ante*, R. 302, 304].

(j) Stipulation that the California Legislative Committee on Un-American Activities, referred to above, had found that the Communist Party advocates the overthrow of government by force and violence [R. 294; rejected as immaterial, R. 295]. This, of course, was a California investigation and

related to the Communist Party, to which the Committee had connected Dorothy Healy as well as respondent Dobbs.

6. The Facts Set Forth in Respondents' Showing Actually Motivated Them in Claiming Their Privilege.

Respondents each made a statement privately in chambers to the trial judge, in which they advised the court that they feared to be linked to the Communist Party through association with Dorothy Healy because of the Government's position that the Communist Party was an organization in violation of the Smith Act and because of the threat of prosecution of its leaders and members [Dobbs, R. 218; Kasinowitz, R. 227; Steinberg, R. 236].

The Opinion Below.

The Court of Appeals held that upon the facts adduced or judicially noticeable or erroneously excluded by the trial court, the privilege had been properly claimed by respondents. In its opinion the court specifically relied upon the following "setting of fact" [5 R. 11]:

1. The selection of respondents along with 30 others by the United States Attorney "because, he says, he thought he could obtain from them the whereabouts of the membership records of the Los Angeles County Communist Party" and the unusual procedure of subpoenaing these people at "seven o'clock in the morning of that day because 'unless served at that time, it would be impossible to effect service thereafter on them'" [5 R. 4].

2. Judicial notice of the classification, by the Attorney General, of the Communist Party and all its state and local branches as an organization "seeking to alter the form of government of the United States by unconstitutional means" [5 R. 4].

3. The prior proceedings, growing out of the same grand jury investigations, against respondents on October 25, 1948 (*Alexander* case, *supra*) and the questions there asked of respondents [5 R. 4].

4. The statements attributed to the United States Attorney in the Los Angeles press of October 27, 1948, which were referred to in section 4 of the summary of respondents' showing, *ante* [5 R. 4].

5. The allegation in the presentments against respondents that the grand jury was inquiring to "ascertain the official identity of one Dorothy Healy; the identity of the person or persons in charge of the books and records of the Los Angeles County Communist Party showing or pertaining to the membership of said organization" [5 R. 5].

6. The findings of the California Legislative Committee to the effect, *inter alia*, that the Communist Party of the United States advocates the overthrow of government by force, that Dorothy Healy is the Executive Secretary of the Los Angeles section of that party, and that respondent Dobbs is the Labor Secretary of that party [5 R. 9].

7. The fact that respondents here must have known that in the same grand jury investigation certain of the witnesses involved in the *Doran* case,[9] who had the same counsel as respondents here, had been asked questions concerning their knowledge of people or organizations in the County of Los Angeles advocating the overthrow of government by force and violence, and that this interrogation occurred on the same day that respondents were interrogated [R. 10].

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[9]It will be recalled that the *Doran* case grew out of the same grand jury investigation and involved civil contempts. It was heard on appeal jointly with the instant case.

ARGUMENT.

I.

This Case Is Not a Proper One for Discretionary Review by This Court Through the Writ of Certiorari.

In seeking issuance of the writ of certiorari the Government relies solely upon an asserted conflict between the decision below and a decision of the Court of Appeals for the Tenth Circuit in *Blau v. United States*, 180 F. 2d 103. There is no conflict between the two decisions warranting the issuance of the writ here to review the decision here involved.

At the outset, we deem it necessary to offer the view that the *Blau* case was wrongly decided. There, the witnesses were asked whether they were members of the Communist Party and whether they knew about its members, officers, books and records. The questions called for answers which might connect those witnesses directly with the Communist Party as members of it. In support of their claim of the privilege the witnesses showed the indictments of the leaders of the Communist Party in the New York District, charging violation of the Smith Act, one charging that the leaders conspired "to organize as the Communist Party of the United States of America, a society . . . of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and the other charging mere membership in the Communist Party with knowledge of the purposes and objects as just stated."[10]

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[10]Copies of these indictments are set out at R. 327 ff. (conspiracy), and R. 331 ff. (membership).

It is plain that under the New York indictments membership in the Communist Party was an important element of the offenses charged, and evidence of such membership would be a highly necessary link in the prosecution's probative chain. It would therefore seem self-evident that a witness before a grand jury would have the privilege not to furnish such evidence from his own mouth (*Counselman v. Hitchcock,* 142 U. S. 547, 585; *Baliman v. Fagin,* 200 U. S. 186; *Smith v. United States,* 337 U. S. 137). Since, as these cases make so clear, the privilege protects against risk of prosecution (see also, *Brown v. Walker,* 161 U. S. 591, 594), the fact of prosecution in New York based solely upon formation of the Communist Party and membership therein (in separate indictments) made the danger to persons in Denver sufficiently immediate. That which the Department of Justice does in New York under the Smith Act it can with equal facility do in Denver.

The case at bar, however, is substantially different from the *Blau* case, and from these differences it is apparent that there is no "conflict" between the decisions within the meaning of Rule 38. The evidence concerning the New York indictments was presented to the trial court [R. 295, 296, 327, 331] and was considered by the court below [5 R. 11]. But there was much additional evidence presented by way of setting to show that the questions put to respondents called for answers which might raise an immediate danger of prosecution. This evidence was summarized in the Statement of Facts, *ante,* and there is a précis of the portions of it relied upon by the court below in the analysis of the opinion below, *ante.* Here, suffice it to say that there were strong indications that the Gov-

ernment was in fact preparing prosecutions under the Smith Act against persons thought to be members of the Communist Party in Los Angeles,[11] that this particular grand jury inquiry was the investigation designed to lead to indictments of that nature, that these respondents had been carefully selected by the Government because of its information as to their connection with and knowledge of the affairs of the Communist Party in Los Angeles, that certain of these respondents, together with others selected for interrogation at the same time, had been publicly identified by reports of the California Legislative Committee as officers of the Communist Party in Los Angeles, that the inquiry itself through certain questions had already turned into such matters as advocacy of the overthrow of government by force, the very offense defined in the Smith Act.

As a result of these factors in the evidence, the Ninth Circuit stated in its opinion [5 R. 11]:

> "We are of the opinion that *without the admission of the New York indictments*, the evidence discloses a setting making it likely that the answers concerning Dorothy Healy and her husband may be directly incriminating or, if not, may lead to such evidence." (Emphasis added; the excerpt will also be found in 181 F. 2d 632, 637.)

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[11]While not in the record of this case, this Court can take judicial notice of a recent announcement by the Department of Justice that it has prepared 12,000 cases for prosecution under the Smith Act of persons known to be members of the Communist Party (testimony of Raymond P. Whearty, Acting Assistant Attorney General, Criminal Division, on Thursday, January 12, 1950, before the Sub-Committee on Appropriations, House of Representatives, on Department of Justice Appropriations for 1951, 81st Cong., 2nd Sess., p. 86).

The decision of the Ninth Circuit therefore turns upon facts which were not before the Tenth Circuit. These facts were obviously not considered or passed upon by the Tenth Circuit. It is therefore impossible to conclude upon the record, as the Government urges [Petition, p. 15], that the decisions are "irreconcilable." They simply were presented on different records and decided on different facts. There is therefore no conflict of decision within the meaning of Rule 38, or otherwise.

The power of this Court in certiorari has always been "sparingly exercised" in the performance of its supervisory functions (*Forsyth v. Hammond,* 166 U. S. 506, 514). The Circuit Court of Appeals Act of 1891[12] created the intermediate courts of appeal to relieve this Court of an intolerably swollen appellate docket, and the writ of certiorari was adopted as a device for use only in exceptional circumstances. From the beginning, this Court has pursued the policy of being "chary in allowance of the writ" (see Frankfurter and Hart, *Business of the Supreme Court at October Term, 1933,* 48 Harv. L. Rev. 238, 260 *et seq.*).

While the very necessities of discretionary review have precluded decisional elaboration of the meaning of Rule 38, Section 5(b), there have emerged some guiding principles determinative here. It has been suggested that the concept of conflict of decisions as used in the Rule does not include "particularistic applications of general rules turning upon the analysis of special states of fact" (Frankfurter and Hart, *op. cit.* at 268-269).

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[12]Act of March 3, 1891, 26 Stat. 826, 828.

II.

In Any Event This Case Was Correctly Decided Below and There Is No Need to Issue the Writ of Certiorari Here.

There is nothing in this record or the result reached which makes any call upon the corrective processes of this Court. The decision below is correct. Neither the dissenting judges nor the petitioning government offer any reasons in fact or law for a different disposition of the case. The focus of attention is not upon the judgment below but upon the judgment of the Tenth Circuit. There, certiorari has been granted, and there this Court's corrective powers can be exercised.

That there is nothing in the result reached by the court below which requires correction by this Court appears from a brief analysis of the facts and the applicable law. Respondents claim the privilege against self-incrimination rests upon reasonable fear of danger of prosecution under the Smith Act (18 U. S. C. (1948 edition) 2385) and the general prohibition against conspiracy to commit any offense against the United States (18 U. S. C. (1948 edition) 371). The pertinent provisions of the statutes are:

> "Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> * * * * * * * *
>
> "Whoever organizes or helps or attempts to organize any society, group, or assembly of persons

who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction." 18 U. S. C. 2385.

"If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U. S. C. 371.

The offenses defined in the foregoing language include at least the following:

(a) Knowingly or willfully advocating the overthrow of government by force or violence;

(b) Knowingly or willfully abetting such advocacy or such overthrow;

(c) Organizing a society, etc., which teaches, advocates or encourages the overthrow of government by force or violence;

(d) Helping or attempting to organize such a society;

(e) Becoming a member of any such society knowing its purposes;

(f) Affiliating with any such society knowing its purposes; and

(g) Conspiracy to do any of the foregoing.

Concededly, the questions propounded to respondents did not on their face disclose the possible incriminatory nature of their answers. It was therefore incumbent upon respondents at the trial to show that answers were "likely to be dangerous" to them (*United States v. Weisman*, 2 Cir., 111 F. 2d 260, 262). The burden upon respondents was not to prove the criminatory character of their answers, for this would force them to divulge the very fact which their privilege required them to suppress. They need only have shown that they were "likely to be in danger by answering" (*United States v. Zwillman*, 2 Cir., 108 F. 2d 802, 803; *United States v. Cusson*, 2 Cir., 132 F. 2d 413, 414).

It is of course well established that the privilege extends not simply to admissions of the commission of crime or of any element thereof. The protection of the Fifth Amendment against being compelled to be a witness against one's self extends to testimony concerning facts which, together with other facts, would constitute part of the probative chain of any element of the crime, and also to facts which might lead to the discovery of any such evidence (*Counselman v. Hitchcock*, 142 U. S. 547, 585; *Arndstein v. McCarthy*, 254 U. S. 71; *Ballmann v. Fagin*, 200 U. S. 186, 195-196; *Smith v. United States*, 337 U. S. 137).

The facts upon which respondents' claim of privilege rested have been summarized in the Statement of Facts, *ante*. It appeared from the testimony of the prosecutor in charge of the investigation that the purpose or necessary effect of the questions put to respondents was to connect them with the Communist Party. Respondents were interrogated for the purpose of ascertaining the whereabouts of the Communist Party membership records [R.

287]. Respondents were selected for questioning because the government had reason to believe that they could give information as to the whereabouts of those records [R. 280-281]. As part of this line of inquiry the government was trying to establish that Dorothy Healy was organizing secretary of the Los Angeles County Communist Party [R. 274-275]. The findings of the California Legislative Committee concerning Dorothy Healy's position in the Communist Party in Los Angeles and that of respondent Dobbs [R. 284-286, 288, 291-292] indicate that the government was following, in the words of Judge Learned Hand, a "warm scent" (*United States v. Cusson*, 2 Cir., 132 F. 2d 413, 414).

Anyone who could testify as to the whereabouts of the Communist Party membership records, or the person having custody or control of them, would by that testimony furnish either evidence to be used in the chain of proof of his own membership in or affiliation with that party, or facts leading to the discovery of such proof.

Additionally, it must be recalled that these questions were put to respondents immediately after they had been asked [as part of the same investigation, R. 265-266] for their own knowledge of the names of the officers of the Los Angeles County Communist Party and the table of organization and duties thereof [see 4 R. 156, Dobbs; 4 R. 164, Kasinowitz; 4 R. 150, Steinberg]. The grand jury inquiry was patently into the internal structure and workings of the Los Angeles Communist Party, by means of obtaining from respondents their knowledge of these things. And, let it be repeated, these respondents were interrogated because, as Carter admitted, the government had reason to believe they knew. Respondents were not chance witnesses, and the questions were directly pointed

to searching out their knowledge of a specific organization, the Communist Party.

The same conclusion follows from the questions themselves. Respondents were asked if they *knew* Dorothy Healy, if they *knew* her occupation, if they *knew* her business or home address, if they *knew* her husband's name, his occupation, etc. They were not asked for things they may have heard about or been told or read somewhere. They were NOT asked if they knew OF Dorothy Healy and her occupation and marital relations in the fashion that one knows of a movie star and her marital relations. They were asked for their own knowledge, for competent testimony of what they themselves knew from direct observation. One does not know another person and what her activities in life are, and where she carries them on, and whether she is married and what her husband's activities are, unless one has had some close association with that person. One obtains such information about another, so that he *knows* it, by carrying on some form of relationship with that person—a business relationship or an organizational relationship, for example. Respondents were not asked to identify Dorothy Healy as a person observed near the scene of a crime or as a driver of a vehicle involved in an accident. Such knowledge usually comes from chance and casual observation of an incident in which the actors are and remain total strangers. Respondents were asked if they knew Dorothy Healy as an individual, if they knew her occupation, business address, husband's name and occupation. This is the kind of knowledge one has of friends or business associates or fellow members in an organization.

Respondents could have obtained such knowledge concerning Dorothy Healy by means of working with her

as members or affiliates of the Communist Party. At the very least—and this is all that is required by the cases—their admission of such knowledge could itself constitute a step in the probative chain connecting respondents with the Communist Party by way of membership or affiliation, or provide means of discovering such proof.

In *Counselman v. Hitchcock, supra,* among the questions as to which the witness claimed his privilege were four, beginning with the words, "Do you know . . ." Three of these dealt with whether Counselman knew of described unlawful activity by specific corporations and the fourth dealt with such activity by any person, real or corporate. Counselman's claim of the privilege was sustained despite the immunity statute because answers to the questions might prove, not simply admissions of a crime or any element thereof, but also the "means by which evidence of its commission or of his connection with it may be obtained or made effectual for his conviction" (142 U. S., at 585. A witness' knowledge, therefore, of activities which are described in the question in such a way as to indicate their illegality, are questions as to which the claim of the privilege is sustainable.

Also, where the question asks whether the witness knows certain persons, and the question is not so framed as to indicate unlawful activities, proof of a setting wherein such persons are involved in possibly unlawful activities will render the claim of privilege supportable. *United States v. Weisman, supra,* involved just such a problem. There the witness was asked, "Do you know anyone who visited, lived in, or stayed at, Shanghai in the years 1934 to 1939?" Upon asserting his claim of privilege, the witness made a showing that included (1) an indictment of 30 others for conspiracy to import narcotics from Shanghai to New York and incorporating cables between

New York and Shanghai dealing with shipment, arrival and payment of the drugs; (2) that his examination was part of an inquiry into the importation of narcotics; (3) a newspaper article stating that the United States Attorney would soon indict as a dealer in narcotics a person who was not named but was described in a manner that fitted the witness. Against such a background it was held that the claim of privilege was good. The Court, through Judge Learned Hand, reasoned that the question must be viewed in its setting, which included other questions put to the witness and "the information of which we may reasonably infer the prosecution had possession." Further, the Court noted, the persons whom the witness would be likely to know in Shanghai "were not many, and among them would be the senders . . . of any cables received." If the witness "had acknowledged such acquaintance, it would probably have directly connected him with the principals in the conspiracy" (*Id.* p. 263). Significantly, the Court expressly decided that the possibility of incrimination there lay in the fact that an answer would have provided one of the "rungs in the rational ladder" whereby the crime could be proven (*Id.* p. 262). It did not hold that the answer might merely provide an evidentiary lead.

The same reasoning has been applied to other questions, apparently innocuous, where the setting shows that answers might reveal association with persons probably involved in an unlawful conspiracy. (*United States v. Zwillman, supra; United States v. Rosen,* 2 Cir., 174 F. 2d 187.)

These being the controlling principles, the danger to the witness in being connected with Dorothy Healy and the Communist Party seems plain. In view of the United States Attorney's admission that he was trying to estab-

lish before the grand jury that Dorothy Healy was Organizing Secretary of the Los Angeles County Communist Party [R. 274-275] and to ascertain the whereabouts of the membership records of the Communist Party [R. 287], we may take it that the Government proceeded on the basis that Dorothy Healy was in fact such an officer of the Communist Party.[18] The findings of the California Legislative Committee give support to this conclusion as well as the proposition that this Communist Party is the same as the one involved in the New York indictments and in the general national antipathy to that organization [R. 284-286, 288, 291-292].

The danger of prosecution to respondents lies in the fact that the Communist Party is held by the chief law enforcement officer of the United States to be an unlawful conspiracy under the Smith Act. It is described in the New York indictments as a "society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" [R. 327-328, 331]. The national officers of Dorothy Healy's organization, at the time of the proceedings before the grand jury and the trial court, had been indicted and were then standing trial for conspiracy to organize it in violation of the Smith Act, and for membership in it, knowing its nature and objects. The Attorney General has administratively determined that Dorothy Healy's organization does in fact and law advocate the overthrow of government by force and violence [R. 311, 13 F. R. 6138, 14 F. R. 4708], and so

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[18]In a later case growing out of the same grand jury inquiry (*Healy, et al. v. United States*, 9 Cir. No. 12283, not yet submitted for decision), the Government introduced extensive evidence identifying Mrs. Healy as the Organizing Secretary of the Los Angeles County Committee, Communist Party.

has the California Legislative Committee [R. 294]. While such determinations may not adjudicate the criminal answerability of members or affiliates of the Communist Party in Los Angeles, they do point emphatically to the danger of prosecution.

That this danger is immediate was indicated by other evidence proferred by respondents. The Los Angeles newspapers, in a report on the indictment of the Communist Party leaders in New York, carried the intelligence received from "local federal attorneys" that the New York indictments "may be the forerunner of a possible nationwide roundup of all Communist Party members *or persons known to be associated in Communist activities*" [R. 336; emphasis added]. A newspaper article reporting on the demand of a United States Senator for prosecution of a number of Communists in a number of American cities, including Los Angeles, also discloses a report "from an apparently responsible source" that the Department of Justice had already (July 18, 1948) decided to convene the grand jury in Los Angeles "for intensive inquiry into Communist activities" [R. 305-306]. The federal grand jury investigates into activities deemed criminal; it is without authority to inquire otherwise.

Moreover, in connection with the very investigation for which respondents were summoned and questioned, United States Attorney Carter was quoted in the Los Angeles press as saying that the grand jury proceeding "is only the opening gun in the government's inquiry into subversive and disloyal groups." The article attributed to "high governmental officials," presumably Carter, a characterization of the grand jury activities as a "top-to-bottom" investigation of Communist activities in Los Angeles [R. 302]. In another Los Angeles paper, Carter and Assistant Attorney General Goldschein were reported

as having said that the grand jury inquiry into Communist activities "is limited to those of government employees at the present time" but "in the event the inquiry turns up evidence of Communistic activities" on the part of others, "they will investigate and prosecute if sufficient evidence is uncovered." [R. 304.]

Respondents' showing, therefore, disclosed not simply a strong likelihood that answers to the questions here involved would connect respondents with the Communist Party, but further that the Government prosecutors viewed that party as a criminal conspiracy under the Smith Act and were actively engaged in preparation to prosecute its members or affiliates. Membership in or affiliation with an organization is essentially a matter of association. Short of documentary proof such as a membership card, membership or affiliation would normally be proven by relationship of the individual to the organization or its officers—a course of dealing, participation in activities, association with the organization or its officers. Such proof is often in the nature of indirect or circumstantial evidence. One who knows an officer of the Communist Party well enough to testify in a court of law that he knows that officer, knows her activities, where she carries them on, what her husband's activities are, would provide some evidence of such association with her and her organization as to forge a link in the chain of proof of membership or affiliation.

In the event these respondents were charged with membership in or affiliation with the Communist Party, the circumstantial evidence would be greatly aided by respondents' admission that they knew Dorothy Healy, her occupation, her business address, her location, her husband's

name and occupation. Respondents would plainly have given evidence which could serve to give significance to other equivocal facts and tip the scale against them. Such evidence would require explanation and answer; it would make it impossible for respondents in such case to rest on their plea of not guilty and force the prosecution to carry the burden of proof on evidence obtained from other sources. Respondents' possible defense predicated on the thesis that the prosecution had failed to show that they ever knew or heard of Dorothy Healy or her activities in the Communist Party could never be asserted.

Such answers—especially those relating to Healy's activities (*i.e.*, occupation and address)—would also supply some proof in the chain to establish knowledge of the purposes of the Communist Party. In this respect, it is to be remembered that in their first appearance before this grand jury on October 25, 1948, respondents were asked questions concerning the officers and table of organization of the Communist Party, answers to which would also have provided proof of their knowledge of the purposes of that organization.

Similarly, answers to these questions might well furnish evidence, or the means of discovering it, to be used to prove that respondents had contravened the statute by abetting the Communist Party or had helped to organize it, knowing its alleged unlawful purposes. These are crimes requiring perhaps less proof than membership or affiliation. They, too, may be proved by circumstantial evidence. Admissions by respondents that they knew Dorothy Healy well enough to testify competently to knowledge of the details about her life called for by these questions could give a thrust to the circumstantial evidence

against them perhaps even more telling than in the case of membership. The same reasoning applies to a conspiracy charge under the Smith Act. Where one so charged knows one of the conspirators so well in a connection directly involved in the gravamen of the charge, the burden of coming forward to disassociate himself may shift to the accused. Under the circumstances here involved, the accused would be in a position of having to explain away evidence against himself taken from his own mouth.

The effect, then, of the questions put to respondents would be to elicit answers which might disclose association with the members of an allegedly criminal conspiracy, facing perhaps imminent prosecution in their own locality. That association might be sufficient to serve as proof connecting respondents with the conspiracy or to discover other evidence of such connection. Where answers may disclose such association, the privilege is properly claimed (*Counselman v. Hitchcock, supra; United States v. Weisman, supra; United States v. Cusson, supra; United States v. Rosen, supra*).

It is therefore submitted that the Court below decided correctly in sustaining respondents' claim of privilege, and reversing the judgments and sentences of the trial court. This being the case, to grant certiorari here would be an idle act, serving only to burden this already overtaxed Court. The judgment below is plainly proper. To call the case here simply for affirmance would serve no purpose indicated for the writ of certiorari in Rule 38.

Conclusion.

There being no basis for granting the writ prayed for, the petition should be denied.

Respectfully submitted,

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